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VERSUS United States

DOCKETED: May 30 1984

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PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-6814

PHILLIP NATHANIEL WILLIFORD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 East Durango Boulevard, B-138
San Antonio, Texas 78206

ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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PHILLIP NATHANIEL WILLIFORD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Phillip Nathaniel Williford, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered February 27, 1984, with petition for rehearing denied March 28, 1984.

QUESTION PRESENTED FOR REVIEW

Whether under § 3161(c)(2) of the Speedy Trial Act, Petitioner was entitled to thirty days preparation time as of right upon a superseding indictment, where dismissal of the prior indictment was occasioned by motion of the government.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court.

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REPORTED OPINION BELOW

The opinion of the United Court of Appeals for the Fifth Circuit was reported as a decision without published opinion in a table at 727 F.2d 1106. A copy of the opinion is appended hereto as Appendix A. Denial of the petition for rehearing was reported in a table at ____ F.2d ___.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit announced on February 27, 1984, with petition for rehearing denied on March 28, 1984. A copy of the order denying the petition for rehearing is appended hereto as Appendix B. This petition is filed within sixty days after denial of the petition for rehearing. Rules 20.1 and 20.4, Supreme Court Rules.

Jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred by Title 28, United States Code, Section 1254(1).

STATUTORY PROVISION INVOLVED

18 United States Code, § 3161(c)(2) provides that "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Western District of Texas, Petitioner was found guilty of six counts of wire fraud, in violation of 18 U.S.C. § 1343; and of one count of false statement to a lending institution, in violation of 18 U.S.C. § 1014. The court of appeals affirmed petitioner's convictions.

The original charge against petitioner was brought by way of sealed indictment filed May 4, 1982, and alleged nine counts of wire fraud and one count of false statement. On August 17, 1982, a superseding indictment was filed which did not change the number of counts charging petitioner, nor the statutes under which the charges were brought.

On April 21, 1983 and prior to seeking dismissal of the pending indictment, the government filed a second superseding indictment which, compared to its predecessor, deleted a portion of the allegation charging petitioner with the scheme to defraud, viz., that petitioner falsely represented that his company was incorporated in the State of North Carolina. Dismissal of the first superseding indictment was obtained by motion of the government. Petitioner was re-arrested on the second superseding indictment and was required to re-post bond.

Petitioner first appeared through counsel on the last indictment on either April 29, or May 2, 1983, by Waiver of Personal Appearance at Arraignment (signed on the former date and given a file mark by the Clerk on the latter date). Petitioner filed prior to trial an "Objection to Trial Setting and Motion

for Continuance" under 18 U.S.C. § 3161(c)(2), based upon the failure of the trial court to allow him thirty days preparation time on the last indictment. Notwithstanding that objection, petitioner was brought to trial on May 3, 1983, either one day or five days from his first appearance through counsel on the indictment that went to trial.

Upon conviction, petitioner was sentenced to the maximum possible sentence on each convicted count, those sentences to run consecutively, plus the maximum possible fine on each count. Petitioner, thus, received a total effective sentence of 32 years, with fines totaling $11,000.

~ [Federal jurisdiction in the court of first instance was predicated upon 28 U.S.C. § 1355.]

REASONS FOR GRANTING THE WRIT

Merits of the Issue

The district court in this case did not allow petitioner the minimum thirty days preparation time prior to trial mandated by 18 U.S.C. § 3161(c)(2) of the Speedy Trial Act[1] even though petitioner specifically asserted his right to such time by way of written objection to the trial setting. As authority for its decision, the trial court relied upon its Final Plan for Prompt Disposition of Criminal Cases, Section D(4)(b), which states that:

> ~ If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information. [§ 3161 (h)(6)]

Although § D(4)(b) of the District Plan relies on § 3161(h)(6) of the Act for its authority governing time to trial, careful reading of the Act indicates that the District Plan misconstrues the scope of § 3161(h)(6). That section provides simply that, where a charge is dismissed upon motion of the government, the interval between the dismissal of the original indictment and the filing of the subsequent indictment is excluded for purposes of computing the maximum time period within which an indictment or information must be filed, or the maximum time period within which the trial of an offense must commence. Section 3161(h)(6) is silent as to whether, upon reindictment, computation of the time to trial runs from the original, or renews with the superseding, indictment. In this case, the district court forced petitioner to trial prematurely based upon § D(4)(b) of the District Plan. Such plan does not have the force of law however and, where it conflicts with the Act, the Act controls. United States v. Arkus, 675 F.2d 245, 248 (9th Cir. 1982).

In Arkus, the defendant was reindicted for "essentially the same offenses." Id. at 246. After noting that the thirty

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[1] 18 U.S.C. § 3161 et seq.

day provision was enacted to ensure adequate preparation time, the court wrote that:

> In the case of a reindictment, a defendant may in fact need less time to prepare his defense because some preparation was undertaken before the original indictment was dismissed. Nevertheless, given that the period between dismissal of the original indictment and reindictment may be considerable, we believe Congress intended that the 30-day period apply also in cases of reindictment.

Id. at 248. (emphasis added)

In United States v. Wooten, 688 F.2d 941 (4th Cir. 1982), the court of appeals addressed the purposes of the exclusion provisions of § 3161(h) as applied to the thirty day preparation right. Holding that the provisions of § 3161(h) do not apply, the court stated that:

> What section 3161(c)(2) does is simply to guarantee to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances.

Id. at 951. (emphasis added)

Following his conviction, petitioner appealed. In affirming the convictions, the Fifth Circuit Court of Appeals addressed petitioner's Speedy Trial claim and, like the trial court, erroneously concluded that, where the government obtains dismissal of an indictment, time to trial runs from the date of the original, and not the superseding indictment. As the opinion reads:

> Under § 3161(d)(1), if an indictment or information is dismissed on motion of the defendant, any re-indictment or re-charging of the same offense or of any offense based on the same conduct, renews the 30-day period prescribed by § 3161(c)(2). The Speedy Trial Act is silent, however, about the effect of a superseding indictment where the prior indictment was dismissed on the motion of the government.

In support of its holding, the Fifth Circuit relied upon United States v. Horton, 676 F.2d 1165 (7th Cir. 1982), which cited United States v. Dennis, 625 F.2d 782 (8th Cir. 1980), which in turn cited United States v. Sebastian, 428 F.Supp. 967 (W.D.N.Y.), aff'd. on other grounds, 562 F.2d 211 (2nd Cir. 1977), aff'd. without opinion, 578 F.2d 1372.

In Sebastian, supra, the issue was denial of a speedy trial claim under the sixth amendment, the rules of the Second Circuit, and the rules of the Western District of New York. 428 F.Supp. at 972. Sebastian was not governed by the Speedy Trial Act. The trial court merely consulted the Act for guidance in dealing with reindictments under the district and circuit court rules. Id. at 973. The thirty day minimum time to trial provision of the Speedy Trial Act was not involved in Sebastian, nor even applicable.

In Dennis, supra, the issue decided was the propriety of excluding a forty-six day continuance, obtained by the government, from the maximum time limits within which the defendant could be brought to trial under the Act. 625 F.2d at 793-94. By granting the government's continuance, the Eighth Circuit noted that "The real issue is whether the court abused its discretion in determining that the ends of justice served by taking such action outweighed the best interest of the public and the defendant in a speedy trial." Refering to the guidelines for continuances set forth in § 3161(h)(8)(A) of the Act, the Eighth Circuit concluded that the trial court did not abuse its discretion. The thirty day minimum time to trial under § 3161(c)(2), however, was in no way involved in Dennis.

Because neither Sebastian nor Dennis addresses the issue of the meaning of § 3161(c)(2) under the Speedy Trial Act, the Horton case, relied on by the Fifth Circuit, is unsound authority for the conclusion that petitioner did not have a right to thirty days' preparation time on the superseding indictment. It bears noting that the Horton opinion itself stated that the Dennis analysis was inapplicable to the issue of the renewal of the thirty day time period under § 3161(c)(2). 676 F.2d at 1170, n.2. The only real issue presented in Horton was the question of which party

was responsible for dismissal of the original indictment. [2] Horton held simply that, where the original indictment was not dismissed on the defendant's motion as alleged, § 3161(d)(1) did not apply. Finding that the indictment was dismissed at the instance of the government, the Horton court specifically noted that, in this circumstance, § 3161(h)(6) does not address the question of whether a new thirty day period begins to run upon return of a superseding indictment.

> Rather, subsection 3161(h)(6) controls a situation where there is an interval between the time the original indictment is dismissed on the government's motion and the superseding indictment is returned. In that situation, the time limitation is tolled during the period when no indictment is outstanding.

Id. at 1170. In reliance on Sebastian, supra, the Horton court nevertheless held that § 3161(h)(6) implied not only that reindictment for the same offense was permissible but that time to trial impliedly runs from the original indictment. Id. As noted above, however, the Sebastian case did not arise under the Speedy Trial Act and, for that reason, its reasoning is an unsound premise for the Horton court's analysis under the Act. Moreover, procedurally, the court in Horton merely answered the question as specifically posed by the parties, who each assumed that the defendant had no right to a new thirty day period where dismissal of the indictment was at the instance of the government. In the case at bar, petitioner clearly asserted his right to the thirty days even though the government was responsible for the dismissal.

Not only did the Fifth Circuit misconstrue the purposes of § 3161(h)(c) by its reliance on the holding in Horton, it erroneously construed petitioner's assertion of his right under § 3161(c)(2) as a simple request for continuance subject to the discretion of the trial judge. Viewing the changes in the indictment that went to trial as minimal, the Fifth Circuit stated that,

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[2] "Both parties agree that the question of whether the time limitation in 18 U.S.C § 3161 begins to run anew with reindictment turns on which party is responsible for dismissal of the original indictment, but they disagree as to which party was responsible for the dismissal in this case." Horton, 676 F.2d 1169.

"Williford was not entitled to a continuance as of right; his request was subject to the discretionary action of the district court." In support of this construction, the Fifth Circuit relied on United States v. Todisco, 667 F.2d 255, 260 (2nd Cir. 1981). Todisco is notable for its complete lack of factual background so that the context in which defendant's motion for continuance arose is not apparent. Todisco simply states that "the Speedy Trial Act, 18 U.S.C. § 3161(c) (1980 Supp.), does not divest the district court of its discretion to grant or refuse a continuance." Id. at 260. Moreover, in Todisco, the Second Circuit held merely that the district court's ruling on the motion for continuance was consistent with the guidelines promulgated by that circuit under the Speedy Trial Act. Id. Inasmuch as the superseding indictment in Todisco was filed on November 25, 1980, and the case does not set forth the actual trial date, the issue as to whether the continuance sought arose under § 3161(c)(2) is unknown. For this reason, Todisco is of limited use in addressing the issue as decided by the Fifth Circuit in petitioner's case.

It must be remembered that the pertinent section reads: "Unless the defendant consents in writing to the contrary, the trial date shall not commence less than thirty days from [the relevant date]." 18 U.S.C. § 3161(c)(2), emphasis added. The statute does not read that, e.g., "If trial is set within thirty days of [the relevant date], the defendant may move for continuance, which shall be ruled upon in the court's discretion as in the case of any continuance." If § 3161(c)(2) had this latter meaning, it would be utterly superfluous and would add nothing to either the common law of continuances, or to continuances in the scheme of the Act. In fact, continuances are specifically provided for by the Act, including the criteria for granting them. 18 U.S.C. § 3161(h)(8). The Fifth Circuit, in its ruling in petitioner's case, mistakenly transformed the mandatory statutory prohibition against trial within thirty days from the date of indictment into an ordinary motion for continuance, reviewable only for abuse of discretion.

Implicit in § 3161(c)(2) is the point that a criminal defendant is tried, and convicted or acquitted, upon a specific indictment. He is not tried upon accusations in the air, or upon prior indictments which have fallen by the wayside during the pendency of the prosecution. With respect to their predecessors, superseding indictments may be substantially the same, very similar, or entirely dissimilar. Under a jurisprudence which vests discretion in the trial judge to determine the minimum time to trial on a particular indictment, the Fifth Circuit's considerations might be pertinent. Where, however, Congress has imposed a statutory scheme which, in very large measure, supplants judicial discretion with objective rules governing the time to trial, those rules control. By legislative fiat, the Speedy Trial Act dictates when trials begin. This being so, trial judges are necessarily foreclosed from seeking results perceived as "better" by the exercise of a discretion which has been statutorily withheld.

A careful reading of the Act indicates that judicial discretion comes into play in only specific areas and, even then, is strictly circumscribed. For example, under § 3162(a), if the time limits of § 3161(b) are not met, the indictment "shall be dismissed." The trial judge has no discretion as to whether to dismiss.[3] The only discretion retained by the judge is whether to dismiss with or without prejudice which, too, is governed by mandatory criteria. Significantly, prejudice to the defendant, or lack of it, is not one of the mandated criteria for determining the finality of the dismissal sanction for violation of the Act.

Elsewhere in the Act, the wide discretion generally vested in trial judges as to the granting of continuances is replaced with mandatory criteria set forth in § 3161(h)(8)(B)(i) through (iv). Section 3161(h)(8) confirms the primacy of Congressional fiat, rather than traditional judicial discretion, in those areas specifically covered by the Act. 1979 U.S. Code Cong. &

[3] See United States v. Gilliss, 645 F.2d 1269, 1275 n. 10 (8th Cir. 1981); House Report, 1974 U.S. Code Cong. & Ad. news, 7401, 7431 ("dismissal is mandatory but not automatic").

Ad. News, 805, 816. In its discretion in petitioner's case, the Fifth Circuit either misconstrued or simply ignored the clear mandate of the Act.

Whether a defendant is entitled to thirty days' preparation time as of right when an overlapping and superseding indictment is filed was recently addressed by the Ninth Circuit in United States v. Harris, 724 F.2d 1452 (9th Cir. 1984). In Harris, as in the instant case, the government obtained a superseding indictment without first dismissing the superseded indictment. The Harris court held that, under this circumstance, § 3161(d)(1), by its terms, did not apply, and that time to trial was governed directly by § 3161(c)(2). The court wrote:

> Here, there was no time gap between the indictments. However, the fact that the indictments overlap does not negate the fact that the government's conduct in obtaining a superseding indictment may in many instances serve to prejudice the defense if additional time to prepare is not granted. This is ably demonstrated by the procedural posture of this case. Harris received a copy of the superseding indictment the day before she was scheduled to go to trial on the charges in the original indictment. The government stated at oral argument that its purpose in obtaining the new indictment was to eliminate one of Harris' possible defenses. Harris was tried immediately after being arraigned on the new charges, and thus received no time to research the new offense or to change trial strategy in light of the government's action. We find such a scenario to be inconsistent with the protective purpose of section 3161(c)(2).

In the instant case, the superseding indictment deleted as part of the scheme to defraud the allegation that petitioner falsely claimed to be incorporated. The reasons for the reindictment, returned just days before trial, was obvious: as part of his defense, petitioner was prepared to, and did in fact, prove that his business was duly incorporated. The sole purpose of the superseding indictment was to take a defensive issue away from petitioner on the eve trial.

As demonstrated above, the authorities which hold that § 3161(h)(6) governs the time to trial under § 3161(c)(2) misapprehend the Act. Had this been the intent of the legislature, §

3161(h)(6) would likely have been set forth as a separate provision and would have appeared in the context of § 3161(d) and (e).[4] Instead, § 3161(h)(6) is but a sub-part of § 3161(h), which deals solely with the question of exclusions from the general computation provisions for calculating time periods under the Act. The specific placement of § 3161(h)(6) within the overall context of § 3161 suggests that it was Congress's express intent to merely exclude by that provision the interval between indictments where a prior indictment is dismissed at the instance of the government. By its terms and location within the Act § 3161(h)(6) does not, as the Horton court and the Fifth Circuit would have it, imply that upon dismissal of an indictment by motion of the government, time to trial runs from the original indictment. The Act is simply silent on this point.

It would seem to defy logic, however, to suggest that the applicability of the thirty day prohibition turns, in the case of reindictment, upon which party obtains dismissal of the preceding indictment. Clearly, when a defendant files a motion to dismiss, he is on notice that there may be a reindictment. Where, on the other hand, the government unilaterally obtains a dismissal and reindictment, (or a superseding indictment without first dismissing the superseded indictment), the defendant may be completely taken by surprise. Surely it would be anomalous to hold that a defendant is entitled to an additional thirty days preparation time in the former situation, but not in the latter. Such an interpretation contradicts the clear import of the Act and its legislative history.

The reasoning applied by the Second, Fifth , and Seventh Circuits to the issues arising under the Speedy Trial Act is not

[4]Section 3161(d)(1) provides for time to trial where an indictment is dismissed upon motion of the defendant. Section 3161(d)(2) provides for time to trial where an indictment is dismissed by the trial court. Section 3161(e) provides for time to trial where retrial is necessary due to either a mistrial, new trial upon motion, or following a successful appeal or collateral attack.

sound authority for the result reached in petitioner's case. Petitioner's authorities from the Fourth and Ninth Circuits are far more persuasive as they interpret the Act by its plain meaning--not by implication. In United States v. Wooten, supra, (emphasis added), it was observed that § 3161(c)(2) of the Act guarantees a "criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances." In United States v. Arkus, supra, involving the government's dismissal and reindictment of defendant on "essentially the same offenses", the Court found a right to a new thirty day period for preparation. The decision was properly arrived at by statutory interpretation rather than by reference to the general law of continuances as stated in Todisco, supra. The case most directly in point, United States v. Harris, supra, is highly persuasive authority for petitioner's reading of § 3161(c)(2), that he is entitled to a minimum of thirty days preparation time as of right on the indictment that goes to trial, regardless of which party obtains dismissal of the prior indictment, and regardless of the degree of change.

Importance of the Issue

This case involves a conflict among the federal courts of appeals as to the interpretation of 18 U.S.C. § 3161(c)(2) of the Speedy Trial Act. A corollary issue of the case is whether § 3161(h)(6) of the Act implies time limitations affecting petitioner's rights under § 3161(c)(2), or whether § 3161(h)(6), instead, means simply what it says. While there is very little authority on the issues raised by this petition, what authority exists is in no way uniform among the circuits as to either the appropriate interpretation of § 3161(c)(2), or the scope of § 3161(h)(6).

In the instant case, the Fifth Circuit Court of Appeals denied petitioner the minimum 30 days preparation time based upon the holdings of the Second, Seventh, and Eighth Circuit Courts of Appeals. While the cases from the Second and Eighth Circuits do not specifically address the issues raised herein, they were

cited as authority in the Horton case, supra, which clearly held that § 3161(h)(6) implies the maximum and minimum times to trial upon superseding indictments, in those cases where a prior indictment is dismissed at the instance of the government. The Horton case held that, in that instance, time to trial runs from the original, not the superseding, indictment.

In direct conflict are the cases decided by the Ninth Circuit. Beginning with United States v. Arkus, supra, the court of appeals held that a defendant has a right to an additional 30 days' preparation time upon reindictment regardless of which party actually obtains dismissal of the prior indictment, and regardless of the similarity of the offense charged. In United States v. Daly, 716 F.2d 1499, 1506 (9th Cir. 1983), the court of appeals held that "any pretrial preparation period shorter than 30 days is inadequate per se." Finally, in United States v. Harris, supra, it was held that a new 30 day preparation period was required upon a superseding indictment even where there was no interval between the dismissal of the prior indictment and the filing of the new charge, and even if dismissal was at the instance of the government.

In conformance with the holdings of the Ninth Circuit, in United States v. Wooten, supra, the Fourth Circuit found a right to a minimum 30 days preparation time "in any circumstances."

As the cited cases demonstrate, the government has a propensity to seek and file successive indictments in search of one tactical advantage or another. The applicability of § 3161(c)(2), prohibiting trial within 30 days of initial appearance on an indictment (or reindictment), is important to the administration of criminal justice in general and to the Speedy Trial Act in particular. Under decisions of the Fourth and, more particularly, the Ninth Circuit, petitioner's specific statutory right was violated. The conflict among the circuits is clear, and resolution by the Supreme Court as to the proper construction of §§ 3161(c)(2) and 3161(h)(6) of the Speedy Trial Act is highly

desirable. Without guidance, such questions of interpretation will continue to arise under the Act, and a defendant's rights will vary depending upon the circuit in which he is brought to trial.

The Supreme Court should exercise its discretion under Supreme Court Rule 17.1(a) to decide this important issue of statutory construction.

CONCLUSION

WHEREFORE, premises considered, Petitioner prays this Honorable Court will grant his petition for writ of certiorari.

Respectfully submitted,

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-138
San Antonio, Texas 78206

ATTORNEY FOR PETITIONER

RESPONDENT'S

BRIEF

ORIGINAL

No. 83-6814

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILLIP NATHANIEL WILLIFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied the minimum preparation time guaranteed by the Speedy Trial Act, 18 U.S.C. 3161(c)(2), because he was tried within 30 days of the return of a superseding indictment.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on six counts of wire fraud, in violation of 18 U.S.C. 1341, and on one count of making a false statement in a loan application, in violation of 18 U.S.C. 1014. He was sentenced to a total of 32 years' imprisonment and was fined $11,000. The court of appeals affirmed. Pet. App. A.

1. The evidence at trial showed that between August 1980 and January 1981, petitioner defrauded several persons in Seguin, Del Rio, San Antonio, and Houston, Texas. Petitioner promised to establish each of the victims in a retail panty hosiery business geared especially for black women. He represented that he owned his own hosiery manufacturing mill and that he was the first manufacturer of hosiery for black women. In reality he owned no such mill. He obtained various sums of money from his victims on

the strength of his promise that he would supply an inventory for their stores, but he never supplied more than a few dozen pair of stockings, while the victims gave him a total of some $40,000.

2. The original indictment charging petitioner was returned on May 4, 1982. A superseding indictment was filed on August 17, 1982. Thereafter, on April 21, 1983, a second superseding indictment was filed. The final indictment was identical to the first superseding indictment, except that it omitted the following introductory paragraph describing the fraudulent scheme:

> It was further a part of the scheme and artifice to defraud that [petitioner] represented to prospective victims that WILLIFORD HOSIERY CO., INC., was a corporation incorporated in North Carolina, when in truth and fact as [petitioner] then well knew, no Articles of Incorporation were ever filed with the Secretary of State of North Carolina.

Relying on the Speedy Trial Act, 18 U.S.C. 3161(c)(2), which states that "trial shall not commence less than thirty days from the date on which the defendant first appears through counsel * * *," petitioner sought a postponement of the scheduled trial date. He argued that the defense preparation period provision precluded commencement of his trial until 30 days had elapsed following return of the second superseding indictment. The district court disagreed, and petitioner's trial began on May 3, 1983, twelve days after the return of the superseding indictment.

The court of appeals affirmed petitioner's conviction (Pet. App. A). The court concluded that, upon the facts of this case, where the indictment upon which petitioner was tried was not materially different from the predecessor indictment, petitioner was not entitled to a new statutory defense preparation period following the return of the second superseding indictment. The court of appeals emphasized that it had not adopted a hard and fast rule that a defendant is never entitled to a new defense preparation period following return of a superseding indictment and dismissal of an earlier indictment upon the government's

motion (Pet. App. A 4-5). Instead, the court ruled that whether a defendant is entitled to a new 30-day preparation period in such circumstances is a matter entrusted to the district court's discretion, to be exercised in light of the purposes of the Speedy Trial Act so as to prevent prejudice to the defendant (id. at A 5). The court of appeals concluded that the district court had not abused its discretion by denying petitioner the requested continuance here (Pet. App. A 5):

> In the instant case we perceive no prejudice to [petitioner]. The original 11-page indictment contained ten counts. The first superseding indictment contained ten counts. The second superseding indictment contains the identical ten counts. The only difference is the deletion of one of the eight introductory paragraphs. This deletion did not materially alter the charges against [petitioner] or the basis for those charges. There was nothing new or different. We view the change as inconsequential. In that setting, we hold that [petitioner] was not entitled to a continuance as of right; his request was subject to the discretionary action of the district court.

3. The court of appeals correctly concluded that the Speedy Trial Act does not require a 30-day moratorium on commencement of trial each and every time that a superseding indictment is returned. The 30-day defense preparation period begins to run "from the date on which the defendant first appears through counsel * * *." 18 U.S.C. 3163(c)(2). Here, petitioner first appeared through counsel on June 17, 1982, at his arraignment on the original indictment. Accordingly, under the plain language of the statute, Section 3161(c)(2) was not violated by commencement of petitioner's trial on May 3, 1983. Nor is there anything in the legislative history of the Speedy Trial Act that supports petitioner's claim that return of a superseding indictment automatically triggers a new 30-day preparation period. See generally, A. Partridge. Legislative History of Title I of the Speedy Trial Act of 1974, at 69-75 (Fed. Judicial Center 1980).

The primary goal of the Speedy Trial Act of 1974 is to assure that criminal trials are promptly conducted. But Congress

feared that defendants might be forced to trial before they could reasonably be expected to be ready. The Act was accordingly amended in 1979 to incorporate a minimum defense preparation period of 30 days, 18 U.S.C. 3161(c)(2). See Patridge, supra, 73-75. Here, petitioner had ample time to prepare -- more than 8 months from the return of the first superseding indictment. The return of the second superseding indictment, which added no new charges, did not increase or alter petitioner's burden of preparing for trial. The Act's defense preparation provision plainly did not mandate further delay of petitioner's trial in the circumstances of his case -- indeed, any contrary conclusion would be wholly at odds with the basic purposes of the Act.

Petitioner alleges that the decision of the court below and the Seventh Circuit's decision in United States v. Horton, 676 F.2d 1165 (1982), cert. denied, No. 82-681 (Feb. 22, 1983), conflict with two Ninth Circuit opinions: United States v. Arkus, 675 F.2d 255 (1982), and United States v. Harris, 724 F.2d 1452 (1984). As we explained in our brief in opposition in Horton, a copy of which has been sent to petitioner, the analysis employed in Arkus, which regrettably was proposed by the government, is patently inconsistent with the language and overall structure of the Speedy Trial Act. Indeed, as we observed in Horton, under the Ninth Circuit's approach there may not be any day on which it is permissible to try a defendant following return of a superseding indictment.

The Ninth Circuit's decision in Harris simply follows Arkus. Moreover, because the superseding indictment in Harris significantly altered the charges, the result in Harris, if not the analysis employed by the court, is readily reconciled with the flexible approach adopted by the Fifth Circuit in this case. Indeed, it is not at all clear that the Fifth Circuit would have reached a different result in a case like Harris. See Pet. App. A 4-5. We note also that another panel of the Ninth

Circuit has recently read Section 3161(c)(2) to require a 30-day trial preparation period following an indictment only when there has been no prior dismissal. United States v. Maybusher, No. 83-5040 (June 15, 1984), slip op. 2579. 1/

On April 16, 1984, the government filed a petition for rehearing, suggesting en banc review, in United States v. Rojas-Contreras, No. 83-5089 (Mar. 2, 1984), an unpublished decision that extends Harris, holding that a new defense preparation period was required even though the superseding indictment merely corrected a typographical error in the original. We are advised by the Ninth Circuit Clerk's office that the petition for rehearing in Rojas-Contreras has yet to be acted upon. While that unpublished decision does indeed conflict with the result here, it is at the least premature to conclude that this Court is called upon to resolve a conflict concerning the application of Section 3161(c)(2) following return of a superseding indictment.

Petitioner has not challenged the court of appeals' conclusion that, on the facts of this case, he suffered absolutely no prejudice from the denial of the continuance he requested. Because that conclusion is plainly correct, and because the court of appeals' unpublished opinion establishes no fixed rule governing application of Section 3161(c)(2) following the return of a superseding indictment, there is no occasion for further review on this petition.

It is therefore respectfully suggested that the petition for a writ of certiorari be denied.

REX E. LEE
Solicitor General

JULY 1984

1/ The decision below does not conflict with United States v. Wooten, 688 F.2d 941 (4th Cir. 1982). The language quoted by petitioner from that case (Pet. 7, quoting 688 F.2d at 951) simply was not addressed to the question raised here, which was not at issue in Wooten.

OPINION

SUPREME COURT OF THE UNITED STATES

PHILLIP NATHANIEL WILLIFORD *v.*
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83–6814. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting from the denial of certiorari.

Petitioner Phillip Williford was convicted of wire fraud in violation of 18 U. S. C. § 1343 and of making a false statement in a loan application, in violation of 18 U. S. C. § 1014. The original indictment charging him was returned on May 4, 1982. A superseding indictment was filed on August 17, 1982, and a second superseding indictment was filed on April 21, 1983. This final indictment omitted one paragraph describing a fraudulent transaction contained in its predecessor.

Petitioner sought a postponement of the scheduled trial date under the Speedy Trial Act, 18 U. S. C. § 3161(c)(2). That provision guarantees an adequate time to prepare a defense to the charge by preventing trial commencement until 30 days from the defendant's first appearance, unless the defendant consents in writing to an earlier date. Petitioner argued that § 3161(c)(2) precluded commencement of his trial until 30 days elapsed following the return of the last indictment. The district court disagreed, and petitioner's trial began on May, 3, 1983, only 12 days after the final indictment was returned.

When an indictment is dismissed on the motion of a defendant, under 18 U. S. C. § 3161(d)(1) any reindictment for the same offense renews the 30-day period of § 3161(c)(2). In this case, however, the Fifth Circuit upheld petitioner's conviction, finding that a different rule applies when the prior

indictment is dismissed on the motion of the government: The minimum time limit runs from the original, not superseding, indictment, and any continuance is left to the discretion of the district judge. This holding is consistent with the view of the Seventh Circuit, *United States* v. *Horton*, 676 F. 2d 1165, 1169 (CA7 1982), the Second Circuit, *United States* v. *Todisco*, 667 F. 2d 255, 260 (CA2 1981), and the Eighth Circuit, *United States* v. *Dennis*, 625 F. 2d 782, 793 (CA8 1980). It conflicts, however, with the rule in the Ninth Circuit. In *United States* v. *Harris*, 724 F. 2d 1452 (CA9 1984), the Ninth Circuit held that the 30-day period applies even when the government obtains an overlapping, superseding indictment. The court explained:

> "We read section 3161(c)(2) as guaranteeing that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial.* Such a construction is necessary to implement the protective purposes underlying section 3161(c)(2)."

724 F. 2d at 1455 (emphasis in original). *Accord, United States* v. *Arkus*, 675 F. 2d 245, 247–248 (CA9 1982); *see also United States* v. *Wooten*, 688 F. 2d 941, 951 (CA4 1982) ("[S]ection 3161(c)(2) . . . guarantee[s] to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances").

Section 3161(c) was designed to protect the basic due process right of having adequate time to prepare a defense without allowing defendants to delay their scheduled trials unduly. S. Rep. No. 96–212, 96th Cong., 1st Sess., p. 32 (1979). There is a direct conflict among the circuits over how that command will be put into effect. Congress intended the Speedy Trial Act to provide a uniform national rule regarding trial scheduling and delay. Yet, because of the conflicting interpretations of the various circuit courts, a defendant's right to a 30-day preparation period after a superseding indictment now depends almost as much on the

happenstance of geography as it does on the will of the legislative branch.

Accordingly, I dissent from the denial of certiorari.